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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 8743

LOU V. BREWER, Warden,

Petitioner,

v.

HERBERT EUGENE BLANCHARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Lou V. Brewer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 21, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix C hereto. The opinion of the United States District Court for the Southern District of Iowa is also not reported. It is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 21, 1970. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a defendant is deprived of effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution made obligatory on the states through the due process clause of the Fourteenth Amendment through the dismissal of his criminal appeal solely because of improper service of his appeal notice by his retained counsel as required by state law.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was convicted of the crime of criminal solicitation in violation of Section 720-2 of the 1966 Code of Iowa in Lee County District Court on January 10, 1968. He was sentenced to a term of not to exceed five years in the Iowa State Penitentiary on February 14, 1968. Respondent then notified his retained trial counsel, Neil McManus of Keokuk, that he desired to appeal to the Supreme Court of Iowa. Mr. McManus, an experienced trial attorney and member of the Iowa Bar since 1938, agreed to perfect the appeal but contacted respondent's present counsel, Roy Meadows of Des Moines, for purposes of handling all other aspects of the appeal. On March 12, 1968, McManus filed a notice of appeal with the Lee County District Court Clerk. However, notice of appeal was not served on the county attorney, as required by Section 793.4 of the 1966 Code of Iowa.[1] Consequently, a motion to dismiss the appeal was filed by the Attorney General of Iowa on April 26, 1968. In keeping with its longstanding decisions holding the requirements of Section 793.4 to be jurisdictional[2], the Iowa Supreme Court sustained said motion on July 29, 1968. Respondent's motion for permission to take a delayed appeal was denied on August 16, 1968.

On August 29, 1968, respondent filed a petition for writ of habeas corpus in Lee County District Court alleg-

[1]Section 793.4 of the 1966 Code of Iowa reads as follows:

> "Taking and perfecting. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof endorsed thereon or annexed thereto."

[2]See, e.g., *State v. Spillane*, 260 Iowa 779, 150 N.W.2d 595; *State v. Birchall*, 260 Iowa 756, 150 N.W.2d 715; *State v. McClure*, 259 Iowa 386, 144 N.W.2d 481; *State v. Fees*, 250 Iowa 163, 93 N.W.2d 103; *State v. Thomas*, 238 Iowa 998, 29 N.W.2d 198.

ing, *inter alia*, that attorney McManus' failure to serve the county attorney as required was such insufficient legal assistnace as to constitute a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution. On September 13, 1968, an evidentiary hearing was had at which the following relevant facts were elicited:

1. A certified copy of the notice of appeal in question was sent to the Attorney General of Iowa by Deputy Lee County District Court Clerk Mary McMurry on March 13, 1968 (T. p. 4).[3]

2. Attorney Neil McManus, after having informed respondent that he would file an appeal on his behalf to the Iowa Supreme Court, sent an original of a notice of appeal and two or three copies to the Clerk of the District Court as had always been his practice in criminal cases. The District Court Clerk always took care of the matter from then on and served the notice on the county attorney and attorney general (T. pp. 12-14).

McManus had followed the above procedure in a criminal appeal two or three years previously and no question had been raised (T. p. 14).

Prior to filing the notice in question McManus had informed Deputy Lee County Attorney Michael Phelan that he was going to appeal and was going to file the notice of appeal with the Clerk. McManus did not recall what Phelan had said to him when told of the above (T. p. 17).

McManus was not aware of Section 793.4 of the Code prior to the filing of the appeal in question (T. pp. 16-17).

McManus was not informed by the Attorney General of Iowa prior to his motion to dismiss that he had not complied with Section 793.4 (T. pp. 14-15).

3. Deputy County Attorney Michael Phelan was contacted by telephone by Mr. McManus sometime prior to

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[3]T. refers to the certified transcript of testimony taken at the September 13, 1968, evidentiary hearing in Lee County District Court on appellee's petition for writ of habeas corpus

> March 13, 1968, and informed that he (McManus) was going to appeal the instant case to the Iowa Supreme Court. Phelan told McManus to either send him the notice of appeal and he would accept service of it and file it with the Clerk or to send the notice to the sheriff and have it served on him. This conversation concerning the appeal in question was quite short and although the two then talked at length about another case nothing more was said about the matter (T. pp. 23-24).
>
> Phelan checked the Clerk's records after he learned the appeal had been taken but did not acknowledge service on the notice of appeal on file. He felt he had no obligation to do so in light of his conversation with Manus (T. p. 24).

On October 11, 1968, the district court dismissed respondent's writ of habeas corpus stating, *inter alia*, "[t]hat the [respondent] was represented by competent and adequate legal counsel throughout his trial; and that the failure to perfect his appeal does not constitute a defect so as to render the judgment of the court subject to collateral attack by way of habeas corpus."

On October 18, 1968, respondent filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Iowa, Davenport Division, alleging substantially the same grounds for relief as raised in the instant case. Respondent then appealed the dismissal of his writ of habeas corpus in state court to the Iowa Supreme Court on October 28, 1968. On December 27, 1968, the United States District Court denied respondent's petition filed therein for failure to exhaust his state remedies. On May 6, 1969, the Supreme Court of Iowa affirmed the district court's dismissal of respondent's writ of habeas corpus stating that while the loss of the right to appeal because of inadequate and inefficient counsel may rise to the level of a constitutional deprivation in a given case with additional facts, it was "not persuaded that allegation standing alone [was] sufficient here to entitle [respondent] to relief by a writ of habeas corpus." *Blanchard v. Bennett*, 167 N.W.2d 612, 615 (Iowa 1969).

The instant petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Iowa, Eastern Division[4] on June 27, 1969. Respondent's only federal constitutional complaint was that he was "deprived of his liberty without due process of law in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States in that he was in effect deprived of assistance of counsel in violation of the Sixth Amendment as made obligatory on the States by the Fourteenth Amendment." On December 4, 1969, the trial court entered a Memorandum and Order vacating and setting aside respondent's sentence and providing that he was to be released from custody and discharged from any obligations under the aforementioned sentence unless the Lee County District Court promptly resentenced him and allowed him to then appeal such final judgment to the Iowa Supreme Court. The trial court's ruling was predicated upon the alleged "ineffective assistance" of Mr. McManus in regard to respondent's appeal. The court, in granting its relief, further found that the State of Iowa (i.e., both Assistant County Attorney Phelan and the Attorney General's Office) contributed to respondent's loss of appeal by deliberately not giving McManus any notice or "hint" of a defect in the notice of appeal until it was too late to remedy the situation.

The State of Iowa filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit on January 5, 1970. On July 21, 1970, the Court handed down its ruling, holding that the respondent "was denied due process and not afforded fair treatment by either his attorney or the State of Iowa" and affirming the decision and order of the District Court. Certiorari is now being taken from that ruling.

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[4]The cause was transferred to the Davenport Division of the court on June 27, 1969, and to the Central Division of the court on August 11, 1969.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF THE SAME CASE IN THE SUPREME COURT OF IOWA, THE HIGHEST STATE COURT, ON A FEDERAL QUESTION.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE CRIMINAL APPELLATE PROCESS IN THE STATE OF IOWA.

As indicated in the Statement of the Case, respondent has had the same issue decided by the Supreme Court of Iowa and the United States Court of Appeals for the Eighth Circuit and the decisions have been directly contrary. In *Blanchard v. Bennett*[5], Iowa, 167 N.W.2d 612 (set forth in Appendix A hereto (See p. 10)), the Iowa Supreme Court, after reviewing the facts and circumstances of the case held that:

> "While the loss of the right to appeal, which is granted by Code section 793.1, because of inadequate or inefficient counsel, may rise to the level of a constitutional deprivation in a given case with additional facts, we are not pursuaded that allegation standing alone is sufficient here to entitle plaintiff to relief by a writ of habeas corpus."

In the case below, the Court of Appeals, after reviewing the identical facts before the Supreme Court of Iowa, held that "in the exceptional circumstances present here, the [respondent] was denied due process and not afforded fair treatment by either his attorney or the State of Iowa." The Court stated that "Failure by appointed or retained counsel

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[5] At the time respondent filed his petition for writ of habeas corpus in state court, John E. Bennett was the Warden of the Iowa State Penitentiary. Subsequent to respondent's action in the federal district court, Mr. Bennett retired and was replaced by Lou V. Brewer, thus the difference in case names.

to commence the simple steps for appeal is a blatant denial of due process."

Subsequent decisions by the state and federal courts have served to further heighten the above uncertainty and conflict. Apparently not content with, in effect, in validating the Iowa law requiring the service of a notice of appeal upon the State, the United States District Court for the Southern District of Iowa has recently used the instant decision to nullify other Iowa appellate requirements under other factual situations. In *Nepple v. Brewer* (unreported but set forth in Appendix D hereto), petitioner's attorney, after having properly perfected his appeal, failed to file petitioner's record within the proscribed time limitation. The case was dismissed by the Supreme Court of Iowa upon motion of the attorney general pursuant to Supreme Court Rule 15.2(c).* Petitioner then obtained other counsel and applied to the Supreme Court for reinstatement of the appeal. On July 25, 1969, the full Court handed down its ruling in an unreported decision, overruling petitioner's application. Petitioner then filed a petition for writ of habeas corpus with the Federal Court and on July 28, 1970, the Court granted the writ, holding "that petitioner herein has been denied effective and complete appellate review through no fault of his own and in view of *Blanchard v. Brewer* . . . it is the view of this Court that petitioner should be granted an opportunity to seek a delayed appeal to the Iowa Supreme Court."

In *Rawls v. Brewer* (also unreported but set forth in Appendix E hereto), petitioner's attorney filed a notice of appeal which did not specify the judgment appealed from as

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*Iowa Supreme Court Rule 15.2(c) provides as follows:

"If the printed abstract of defendant's brief and argument is not filed within the time herein specified or any extension thereof this court shall on its own motion or on application of the state dismiss the appeal with prejudice."

required by Section 793.2 of the Iowa Code[7] (See *State v. Fees*, 250 Iowa 163, 164, 93 N.W.2d 103) and was not addressed to the State or its attorney of record as required by *State v. McCollom*, 260 Iowa 977, 151 N.W.2d 519. Upon motion by the Attorney General, the appeal was dismissed by the Supreme Court. Petitioner then filed his petition for writ of habeas corpus with the District Court and on September 30, 1970, the Court, citing *Blanchard v. Brewer*, granted petitioner 60 days in which to seek a delayed appeal or other comparable remedy in the Iowa Supreme Court, stating:

> "It appears that . . . review was denied . . . through no fault of petitioner and on rather technical grounds. There is no question here but that the notice of appeal in question was served on the proper party. Although it did not specify the judgment appealed from, it did carry the caption of the case. It is difficult to see how anyone other than petitioner has been prejudiced under the facts presented here."

This decision has been appealed to the Court of Appeals for the Eighth Circuit by the State.

The Supreme Court of Iowa has also handed down a number of decisions heightening the conflict and uncertainty brought on by the two *Blanchard* decisions. On November 12, 1969, the Court handed down *Cleesen v. Brewer*, Iowa, 172 N.W.2d 262, where, on facts substantially similar to those in *Blanchard*, it discussed the applicability of *Rodriques v. United States*, 393 U.S. 327, to that decision and concluded (172 N.W.2d at 263):

> "The Rodriquez case is easily distinguishable from ours on several factual matters which we find significant. First, the federal district court refused to entertain a motion which defendant's counsel sought to make after sentencing. The motion was

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[7] Section 793.2 of the 1966 Code of Iowa reads as follows:

"An appeal can only be taken from the final judgment, and within sixty days thereafter."

intended to show defendant should be allowed to proceed in forma pauperis. The supreme court held this alone should have alerted the trial court that defendant was contemplating an appeal and that he would be without counsel unless the forma pauperis motion was granted. Second, defendant's petition in habeas corpus alleged he had been *fraudulently* deprived of his right of appeal. No allegation of fraud is made here. Third, the supreme court found the trial court erroneously failed to advise defendant of his right to appeal, despite Federal Rule of Criminal Procedure 37(a)(2) which directed him to do so (Emphasis the Court's).

"It is apparent from the above that Rodriquez was not decided on constitutional grounds which would compel its application here. It is further evident the opinion attaches considerable importance to the failure of the trial court to discharge its obligation to advise defendant concerning his right to appeal, a circumstance entirely absent here.

"Although we are not obliged to follow the Rodriquez decision, we may do so, of course, if its reasoning is persuasive. However, under this facts presented here we are not inclined to abandon the rule so recently approved in the Blanchard case."

On May 5, 1970, after the federal district court decision in *Blanchard* and while the appeal of the same was pending in the Court of Appeals, the Iowa Supreme Court handed down *State v. Horsey*, Iowa, 176 N.W.2d 769. There, the defendant from his appealed conviction of operating a motor vehicle while intoxicated. The Iowa Court dismissed the appeal, as here, for failure to serve notice of appeal upon the County attorney as required by Section 793.4 of the Iowa Code. The Court stated that they were obliged to do so "even though the State [had] not raised the question and [did] not ask a dismissal on that ground." However, on October 13, 1970, the Supreme Court reluctantly withdrew their previous opinion and proceeded to the merits of defendant's appeal. In the words of the Court:

"While we are not bound by the decision in *Blanchard v. Brewer* . . . we nevertheless feel defendant Hovey should not be required to seek help from the federal courts while we still have it within our power to give him the same relief he would undoubted secure there."

This Court in *McKane v. Durston*, 153 U.S. 684, held that review by an appellate court of the final judgment in a criminal case is not a necessary element of due process law. The Court further held that the "right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." 153 U.S. at 687-688. As has been seen, the State of Iowa has granted a right of appeal by statute which is qualified by numerous requirements which have been uniformly and consistently applied over the years by the Supreme Court of Iowa. The decision below, particualrly as it has been interpreted by the Federal District Court in *Nepple v. Brewer* and *Rawls v. Brewer*, both *supra*, has in effect substituted the Court of Appeals idea of what is fair and equitable for the taking of criminal appeals in Iowa for those requirements presently existing. Indeed, there is no reason to believe that the *Blanchard* decision will not be read to hold that defendants in Iowa must in all instances be afforded an absolute right to appellate review as a matter of due process.

As is readily apparent, the instant conflict has become virtually intolerable. The matter has become of statewide concern as is evidenced by the editorials in the state's two largest newspapers set forth in Appendixes F and G herein. During the period of 1967 to 1969 there have been by actual count some 149 appeals dismissed on motion by the Iowa Supreme Court for violations of various state appellate requirements. The State is at a loss to know which of these requirements, if not all, is (or perhaps more properly, will be held to be) within the purview of the Blanchard decision below and is thus faced with appealing each new decision of the District Court as it arises over the next few years to the Court of Appeals. The Supreme Court of Iowa, with their own decisions declaring Iowa's appellate re-

quirements to be mandatory and jurisdictional and having no propensity to themselves overrule or modify the same, is also faced with uncertainty as to the full effect of the *Blanchard* and how to proceed hereafter. This Court has in recent years reviewed Iowa appellate rules and regulations on two occasions, *Long v. District Court of Iowa*, 385 U.S. 192, and *Entsminger v. Iowa*, 386 U.S. 748. We feel that it is imperative that the Court do so again here.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

EUGENE BLANCHARD,

Appellant

v. FILED MAY 6, 1969

ROBERT L. BENNETT, Warden Iowa State Penitentiary, Fort Madison, Iowa, 87 53560

Appellee

The sole question presented by this habeas corpus action is whether plaintiff, Eugene Blanchard, is entitled to release from custody because his retained counsel failed to comply with the statutory procedure required to perfect an appeal from a criminal conviction.

Plaintiff was convicted of criminal solicitation upon a jury trial in Lee County District Court. Sentence of a term not to exceed five years in the state penitentiary at Fort Madison was imposed February 14, 1968. Code section 724.2. Plaintiff professed his innocence and notified his retained attorney, Neil McManus, of his desire to appeal from said conviction. Mr. McManus, an experienced trial attorney and member of the Iowa Bar since 1938, agreed to perfect the appeal but contacted plaintiff's present attorney for purposes of handling all other aspects of the appeal.

On March 12 Mr. McManus filed a notice of appeal with the district court clerk. March 13 the clerk mailed a certified copy of this notice to the attorney general's office. The clerk on March 14 mailed to the clerk of this court a transcript of all record entries in the case as required by Code section 793.6.

Section 793.4, Code, 1966, provides: "Taking and perfecting. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of

the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto."

Plaintiff concedes the notice of appeal was never served on the county attorney as required by section 793.4 and of course evidence of service thereof was not endorsed thereon or annexed thereto. This substantial oversight was due in part to Mr. McManus' mistaken reliance on his past practice in handling appeals whereby he had relied on the district court clerk to forward a copy of the notice of appeal to the county attorney. He testified he was not aware of the statutory requirement that in criminal cases the notice of appeal must be served on the county attorney. The procedure followed by Mr. McManus was that provided by rule 336, Rules of Civil Procedure, for giving notice of appeal in a civil case. The county attorney had been advised an appeal would be taken and learned later a notice of appeal was on file in the clerk's office.

No proper notice of appeal having been served on the county attorney or his assistant a motion to dismiss the the appeal was filed by the assistant attorney general on April 26 and sustained by this court on July 29. On August 16 we denied an application for permission to take a delayed appeal. The application was based on Mr. McManus' mistake and made no contention the state had in any way interfered with the attempt to appeal.

Thereafter, plaintiff filed his petition for a writ of habeas corpus. Following an evidentiary hearing the trial court filed his findings of fact and conclusions of law.

The court's findings include: "1) That the plaintiff makes no claim that his legal counsel did not properly and adequately represent him at all stages of his trial prior to imposition of sentence.

"2) That the plaintiff is being held in the Iowa State Penitentiary at Fort Madison, Iowa, by virtue of a mittimus directed to the Warden of the Penitentiary, following the entry of judgment and imposition of sentence on February 14, 1968.

"3) That the plaintiff was represented by competent and adequate legal counsel throughout his trial, and that the failure to perfect his appeal does not constitute a defect so as to render the judgment of the court subject to a collateral attack by way of habeas corpus."

The trial court concluded "the plaintiff has failed to establish his claim that he was deprived of competent counsel and insufficient legal assistance so as to constitute a lack of adequate legal counsel."

From denial of a writ of habeas corpus plaintiff has appealed. We affirm.

I. We have uniformly held the trial court's findings in a habeas corpus action not involving custody of a child are binding upon us if supported by substantial evidence. Scalf v. Bennett, ____ Iowa ____, 147 N.W.2d 860, 862; Herold v. Haugh, 259 Iowa 667, 669, 145 N.W.2d 657, 659; Birk v. Bennett, 258 Iowa 1016, 1019, 141 N.W.2d 576, 578.

II. Service of the notice of appeal upon the county attorney or an assistant county attorney is necessary to perfect an appeal from a criminal conviction. Without such service, as required by section 793.4, this court is without jurisdiction to consider a defendant's appeal. An appeal in a criminal case cannot be taken and perfected by filing the notice of appeal with the clerk of the court in the manner of a civil action. State v. Spillane, ____ Iowa ____, 150 N.W. 2d 595; State v. Birchall, ____ Iowa ____, 150 N.W.2d 715; State v. McCune, 259 Iowa 386, 144 N.W.2d 401; State v. Fees, 250 Iowa 163, 93 N.W.2d 103; State v. Thomas, 238 Iowa 998, 29 N.W.2d 198.

We do not understand plaintiff contends we erred in refusing to entertain his defectively filed appeal or in denying his application for a delayed appeal. In Ford v. State, 258 Iowa 137, 138 N.W.2d 116, we affirmed the trial court's denial of a writ of habeas corpus but, under the peculiar facts, granted a delayed appeal. There the evidence revealed Ford, without counsel had been prevented from giving timely

notice of appeal by either misfeasance or malfeasance on the part of the state authorities at the men's reformatory. No such contention or facts are before us here.

III. Plaintiff argues he is entitled to a writ on the ground he was deprived of adequate and effective counsel following his conviction in that said counsel failed to serve notice of appeal in accordance with section 793.4. He makes no contention of any violation of constitutional rights during trial of the criminal case.

We are aware of the importance and continually expanding scope of the writ of habeas corpus. See Harris v. Nelson, Sup. Ct. Advance Sheet; Kaufman v. United States, Sup. Ct. Advance Sheet, both filed March 24, 1969. We are not, however, persuaded plaintiff's allegation of inadequate counsel, standing alone and viewed within the context of the facts of this case, presents a question of the necessary constitutional dimensions to warrant issuance of the writ.

Although the Supreme Court has not squarely ruled on this rather narrow issue, other courts have held relief by way of post conviction remedies foreclosed under similar facts.

In Dennis v. United States, 4 Cir., 177 F.2d 195, petitioner appealed from the district court's order denying his application for collateral relief under 28 U.S.C.A. section 2255. In its affirmance the court of appeals at page 195 said: "He claims that his counsel did not take an appeal for him as instructed; but, aside from the fact that it appears that counsel advised him that he had no ground for appeal and received no further instructions, failure to appeal may not be excused upon a mere showing of neglect of counsel. The motion was properly denied."

In Mitchell v. United States, D.C. App., 254 F.2d 954, 955, petitioner alleged he had been denied effective assistance of counsel because his trial counsel had failed to appeal. In affirming the district court's denial of post conviction relief the court said: "It has been said that 'failure to

appeal may not be excused upon a mere showing of neglect of counsel.' Dennis v. United States, 4 Cir., 177 F.2d 195. Perhaps that statement is too broad. We need not now decide whether failure to appeal would be a denial of effective assistance, and would open a conviction to 'collateral attack' under §2255, if there were plain reversible error in the trial. There was no such plain error in this trial."

In Peabody v. United States, 9 Cir., 394 F.2d 175, petitioner appealed from the district court's denial of his application for post conviction relief. He alleged he had been denied his right of direct appeal and that prejudicial errors had been committed during his trial. In refusing to grant relief on either count the court at page 177 said: "We have examined the record and fully agree with the district court that appellant has not disclosed the nature of the error and the prejudice which he proposes, by this appeal, to correct. His allegations are purely conclusionary.

"It is settled in this Circuit that a motion to vacate sentence, on the ground that petitioner's right to appeal has been frustrated, may succeed only if the motion alleges facts showing the occurrence of prejudicial trial errors that would have called for reversal of his conviction. Rodriquez v. United States, 387 F.2d 117 (9th Cir. 1967); McGarry v. Fogliani, 370 F.2d 42 (9th Cir. 1966) and cases cited in fn. 6, at page 44 thereof." For discussion of the same issue in the lower court see 173 F. Supp. 413.

In Pitts v. State of North Carolina, M.D. North Carolina, 267 F. Supp. 870 (reversed on other grounds, 394 F.2d 182), petitioner sought a writ of habeas corpus alleging among other things, he had been denied his right of appeal because of his counsel's neglect in failing to perfect an appeal. In denying relief on this ground the district court said at page 875, 267 F. Supp.: "There is some divergence of opinion among the courts on the effect of the neglect of counsel to perfect an appeal on a habeas corpus petitioner's rights. Our Circuit Court has said that failure to appeal may not be excused upon a mere showing of neglect of counsel.

Many cases hold that in order for the petitioner to receive an appeal he must show that plain error was made at the trial which would have made his appeal fruitful. One case says that the state must show that an appeal would have been futile. The weight of authority clearly stands for the proposition that the petitioner who claims he was denied his right to appeal through the neglect of counsel must show that his appeal would have been fruitful. This Court is persuaded to follow that line of authority."

In Dodd v. United States, 9 Cir., 321 F.2d 240, 243, the court recognizes the general principle that "(1) failure to appeal may be be excused by a mere showing of *neglect* of counsel." The footnote sets out and discusses several authorities supporting this principle. See also Layne v. United States, E.D. Tenn., 246 F. Supp. 656, Anno. 19 A.L.R.2d 789, pages 794 and 804, Anno. 74 A.L.R.2d 1390, page 1457.

From a careful review of the cases which have considered the problem two general principles emerge: (1) failure to appeal is not generally excused by a mere showing of neglect of counsel and (2) in any event to become entitled to relief by way of collateral attack on such a claim petitioner must allege and demonstrate prejudicial error in the trial proceedings.

Here we are presented with no more than a demand to be released from custody on the single allegation of incompetent counsel for failure to properly perfect an appeal. While the loss of the right to appeal, which is granted by Code section 793.1, because of inadequate or inefficient counsel, may rise to the level of a constitutional deprivation in a given case with additional facts, we are not persuaded that allegation standing alone is sufficient here to entitle plaintiff to relief by a writ of habeas corpus.

Although not decisive of the issue before us, it is worthy of note that plaintiff was represented at trial and here, by retained counsel of his choice. In United States v. Follette, 2 Cir., 358 F.2d 922, complainant brought a habeas corpus

action alleging his assigned counsel had not properly protected his right to appeal. In addressing himself to this problem Judge Friendly, writing for a three judge panel at pages 925, 926, said: "We likewise do not understand Mitchell now to claim that failure of assigned counsel properly to advise him of his right to appeal would be attributable to the state. Occasional shortcomings of counsel are a danger confronting all, a point clearly recognized in Coppedge, 369 U.S. 443, n.5, 82 S.Ct. 917, and those able to retain counsel may forfeit the right to appeal through such oversight or ineptitude as fully as those who are not. See Berman v. United States, 378 U.S. 530, 84 S.Ct. 1895, 12 L.Ed.2d 1012 (1964); Peoples v. United States, 337 F.2d 91 (10 Cir. 1964), cert. denied, 381 U.S. 916, 85 S.Ct. 1540, 14 L.Ed.2d 436 (1965)."

Plaintiff relies heavily on State v. Williams, 181 Neb. 692, 150 N.W.2d 260, wherein a divided Nebraska Supreme Court in a post conviction proceeding ordered a delayed appeal be granted to a petitioner who had lost his right to direct appeal through counsel's failure to perfect an appeal. It is readily distinguishable from the case at bar for several reasons. The court there stressed the fact of petitioner's indigency, emphasized counsel refused to take an appeal even though requested by petitioner to do so, and noted petitioner alleged other errors in the trial proceedings. These seemingly critical factors are not present here. The case has little, if any, authoritative value under the facts here.

Plaintiff also cites State v. Mason, 90 N.J. Super. 464, 218 A.2d 158, where an indigent defendant appearing pro se brought a habeas corpus action alleging he had been illegally denied his right to a direct appeal. The question of incompetent counsel for failure to perfect an appeal was never raised. All attempts to appeal had been made by the petitioner himself. Noting that petitioner was an incarcerated indigent who had without the aid of counsel made repeated bona fide attempts to file a notice of appeal within the proper time, the court set aside the conviction. Neither

the facts nor the issues raised there are relevant or persuasive authority for plaintiff's position here.

The other cases cited by plaintiff are similarly inapposite to the facts and issues here under consideration.

The trial court's findings of fact are amply supported by the record. The order appealed from was correct. - Affirmed.

All Justices concur except Rawlings and Becker, JJ. who dissent.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

HERBERT EUGENE BLANCHARD,)
No. 30366
Petitioner,) Civil No. 8-2394-C-1
v.)
LOU V. BREWER,) MEMORANDUM
Respondent.) AND ORDER

This matter is before the Court on petition of Herbert Eugene Blanchard, hereinafter referred to as petitioner, for a writ of habeas corpus.

As grounds for issuance of the writ, the petition, as filed by counsel for the petitioner, recites the following:

> (a) Petitioner is deprived of his liberty without due process of law in violation of Article I, Section 1 and Article I, Section 9 of the Bill of Rights of the Constitution of Iowa with regard to deprivation of life and liberty without due process of law.
>
> (b) Petitioner is deprived of his liberty without due process of law in that he was deprived of assistance of adequate legal counsel as provided in Article I, Section 10 of the Bill of Rights of the Constitution of Iowa.
>
> (c) Petitioner is deprived of his liberty without due process of law in violation of the 6th and 14th Amendments to the Constitution of the United States in that he was in effect deprived of assistance of counsel in violation of the 6th Amendment as made obligatory on the States by the 14th Amendment.

It appears that each of the aforesaid grounds were previously presented to the Lee County Iowa District Court in a petition for writ of habeas corpus filed in that court. The findings and conclusions of the Lee County Court were adverse to the petitioner and the writ denied. The Iowa Supreme Court affirmed, two Justices dissenting. *Blanchard v. Bennett*, 167 N.W.2d 612 (Iowa 1969).

The decision of the Iowa Supreme Court is, of course, a final adjudication relative to the Constitution and laws of that state. Therefore, this consideration is limited to the allegations of the petitioner relating to the Constitution of the United States.

There is no real dispute concerning the facts giving rise to this litigation. Upon trial by jury in the Lee County Iowa District Court, petitioner was convicted of criminal solicitation in violation of Iowa Code § 724.2. Mr. Neil McManus, an experienced trial lawyer and member of the Iowa Bar since 1938, was retained by petitioner and represented him at trial.

On February 14, 1968, the trial court imposed a sentence of a term not to exceed five years in the state penitentiary at Fort Madison. Petitioner notified McManus that he desired to appeal. McManus agreed to perfect the appeal but contacted petitioner's present counsel for purposes of handling all other aspects of the appeal. On March 12, 1968, McManus filed a notice of appeal with the district court clerk. However, notice of appeal was not served on the County Attorney as required by Iowa Code § 793.4.[1] Sub-

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[1] Iowa Code § 793.4 (1966) provides:

"Taking and perfecting. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof endorsed thereon or annexed thereto."

sequently and after the time in which an appeal could be perfected had expired, a motion based on the improper notice and requesting dismissal of the appeal was filed by the state. In keeping with its decisions holding the requirements of §793.4 to be jurisdictional, the Iowa Supreme Court sustained the motion.

On August 16, 1968, the Iowa Supreme Court denied petitioner's motion to take a delayed appeal. As previously noted, subsequent collateral attacks by way of application for writ of habeas corpus have failed to aid the petitioner.

The Iowa Attorney General has attached to the memorandum filed in support of his return on behalf of the defendant herein a copy of the transcript of testimony taken at the habeas corpus hearing conducted by the Lee County Iowa District Court. Since the substance of the transcript has not been contested, the facts disclosed therein will be considered correct. The following additional facts are noted.

The petitioner's attorney, Neil McManus, failed to properly serve the County Attorney as required by Iowa Code §793.4 because he was unfamiliar with that provision of the Iowa law. On at least one previous occasion, McManus perfected a criminal appeal without the required service on the County Attorney with no adverse results. It also appears he filed criminal appeals for other members of his firm in the same manner as he filed petitioner's appeal here.

The Assistant County Attorney in charge of petitioner's case knew of the improperly perfected appeal prior to the last point in time an appeal could have been properly perfected. He had been informed via telephone that an appeal was being taken. Later, he examined the District Court Clerk's file and found that an attempt to appeal had been made. The appeal notice was on file, but no notice had been served on the County Attorney. Nevertheless, it being his first criminal case on behalf of the state, the Assistant County Attorney looked up the applicable code sections and took the necessary steps to conform therewith and mailed the required documents to the Iowa Attorney

General. In addition to the foregoing, the Lee County District Court Clerk's office forwarded a certified copy of notice of appeal to the Attorney General's office shortly after it was filed by McManus.

Even in view of the foregoing facts, petitioner was never given any notice of a defect in his appeal. His attorney, Mr. McManus, was never given any sort of hint that something was wrong until the motion for dismissal was received at a point in time too late to remedy the situation. No one ever accepted or acknowledged service on the part of the County Attorney as required by law.

The situation obtaining here can be summed up as follows: The Assistant County Attorney knew of the appeal within the statutory time limits for perfection of an appeal and knew that it was not properly perfected. It would also appear that the Iowa Attorney General's Office was aware an attempt had been made to perfect an appeal. Apparently no one was surprised and the state in no way prejudiced by the lack of strict compliance with the statute. In other words, it appears petitioner's appeal was dismissed on motion by the Iowa Attorney General due to lack of strict complaince with the technical requirements of Iowa Code § 793.4 and for no other reason, without prior notice to petitioner or his counsel of the defect.

In considering an allegation of denial of effective assistance of counsel, it is helpful to first classify the particular case being considered. Such cases can be classified in two broad categories—those where counsel was appointed for the defendant and those where defendant selected and retained his own counsel. The case at bar fits the latter category.

The failure of counsel to take the simple steps required to file notice of appeal when instructed by his client to do so constitutes such an extraordinary inattention to a client's interests as to amount to ineffective assistance of counsel. *Williams v. United States*, 402 F.2d 548 (8th Cir. 1968). It can make no real difference because the result obtains from counsel's mistaken beliefs con-

cerning the proper procedures. Further, it is immaterial whether defendant-petitioner shows that his appeal would have been fruitful. *Rodriquez v. United States*, 395 U.S. 327 (1969).

Even prior to the holding in *Rodrequez v. United States, supra*, the Eighth Circuit did not require a showing concerning the issues to be raised on appeal. See *Williams v. United States, supra*, at 552 where the Court said:

> "We hold Williams was deprived of his constitutional right to effective assistance of counsel at the critical time between sentence and the expiration of time to appeal and that he was thereby deprived of his constitutional right to appellate review of his conviction."

The opinion makes no mention of a requirement of showing of issues that would be raised on appeal.

It is true, of course, that at common law there was no review of criminal convictions as of right. Due process, then, does not comprehend the right of appeal. *Dist. of Columbia v. Clawans*, 300 U.S. 617, 627 (1936). However, Iowa law gives the right to appeal to the Iowa Supreme Court convictions in criminal cases.[3] Where such right is given it is substantial and an accused may not be deprived thereof by any act or failure to act upon the part of the state which unfairly denies him his appeal. *Cochran v. Kansas*, 316 U.S. 225 (1942); *Scobie v. State of Oklahoma*, 239 F.Supp. 646, 648 (1965). The Iowa Supreme Court has held that a delayed appeal was an available remedy in one such situation. *Ford v. State of Iowa*, 258 Iowa 137, 138 N.W.2d 116 (1965). In this connection, see also *State v. Alderman*, 150 N.W.2d 312 (Iowa 1967, wherein the Iowa Supreme Court disregarded the fact that notice was apparently not properly served on the County Attorney and reviewed the record on the clerk's transcript as a matter of grace.

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[3] See Iowa Code Chapter 793 (1966).

It is the view of this Court that when all the circumstances presented by this case are considered as a whole, it must be concluded that the state has contributed to the loss of petitioner's appellate rights in violation of Section 1, Article XIV, Amendments to the Constitution of the United States of America. This is not to say there is any one act or omission on the part of the state or its officers here, in and of itself, sufficient to constitute such a violation. Nevertheless, the result is unjust. Petitioner should not be denied his right to appeal which was improperly perfected under the circumstances present here.

When constitutional rights have been violated, this Court has broad powers to fashion an appropriate remedy and dispose of the matter as law and justice require. 28 U.S.C. §2243; *Peyton v. Rowe*, 391 U.S. 54, 66 (1968); *Farrant v. Bennett*, 249 F. Supp. 549 (1966), *cert. denied*, 384 U.S. 965. Under the Iowa law, an appeal in criminal cases can only be taken from the final judgment, and within sixty days thereafter. Iowa Code §793.2 (1966). Final judgment means the sentence. The sentence is the judgment. *State v. Klinger*, 259 Iowa 381, 144 N.W.2d 150 (1966). If the sentence here is vacated, the relief will be sufficient. The conviction need not be disturbed. There is no reason, then, why the Lee County Iowa District Court cannot promptly resentence the petitioner upon filing of this memorandum and order. Petitioner will then have sixty days subsequent to the resentencing to perfect an appeal. If petitioner's conviction is ultimately affirmed full credit will be given for time already served. See *Sefcheck v. Brewer*, 301 F. Supp. 793 (S.D. Iowa 1969).

ORDER

IT IS ORDERED that the sentence of the Iowa District Court, in and for Lee County imposed upon petitioner February 14, 1968, upon his conviction of criminal solicitation in violation of Iowa Code §724.2 be and is hereby vacated and set aside.

IT IS FURTHER ORDERED that, unless the Lee County Iowa District Court promptly resentence petitioner and upon proper application and notice by petitioner, an appeal therefrom is granted within sixty days thereafter, petitioner be released from the custody of Lou V. Brewer, defendant herein and be discharged from any obligations under the sentence heretofore imposed.

Dated this 4th day of December, 1969.

/s/ Roy L. Stephenson
CHIEF JUDGE

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,101.

Herbert Eugene Blanchard, Appellee,
vs.
Lou V. Brewer, Warden, Appellant.

Appeal from the United States District Court for the Southern District of Iowa, Central Division.

[July 21, 1970.]

Before VOGEL, HEANEY and BRIGHT, Circuit Judges.

VOGEL, Circuit Judge.

Appellant (the State of Iowa) presents this court with the question of whether it may deny a criminal appeal to appellee, Blanchard, solely because of improper service of the appeal notice, although the State had actual notification of the filing. We hold it cannot, and affirm.

Blanchard was originally convicted of criminal solicitation in the Iowa State District Court and sentenced to a term not to exceed five years on February 14, 1968. He immediately requested his personally selected and retained attorney, an experienced member of the Iowa bar, to appeal. The attorney agreed to file proper notices but

contacted another member of the bar to present written and oral argument on the appeal.

The attorney verbally conveyed notice of appeal to the Assistant County Attorney who prosecuted the case and filed written notice on March 12, 1968. A certified copy of that notice was forwarded to the Attorney General's office on March 13, 1968. Furthermore, on March 14th, a transcript of all written entries in the case was forwarded to the Iowa Supreme Court. However, no written notice of appeal was formally served on the Assistant County Attorney, as required by Iowa law.[1]

Subsequently, the Assistant County Attorney checked the court file to see if notice of appeal was filed. He saw the notice but did not acknowledge service thereof, although he was fully aware of its existence and had talked with appellee's attorney regarding it. On April 26, 1968, motion was made by the Assistant Attorney General to dismiss the appeal for failure to serve properly. The motion was sustained by the court on July 29, 1968. An attempt for permission to enter a delayed appeal was summarily denied on August 16, 1968.

Blanchard then attempted to extradite his position through state habeas corpus proceedings. His attorney candidly admitted he was not familiar with the requirements for criminal appeals in Iowa. He also added that customarily he always appealed according to the civil code

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[1] Iowa Code Annotated § 793.4 reads

"An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto."

His attorney filed notice pursuant to Iowa's civil code, which merely requires filing with the clerk of court, who will then serve copies on the adverse parties. See Iowa Civil Code Annotated § 336.

and the appeals were never dismissed. However, in spite of the claims, the petitions were ultimately denied, the Supreme Court of Iowa, by a divided vote, holding the notice requirements to be jurisdictional. See, *Blanchard v. Bennett*, Ia., 1969, 167 N.W.2d 612. Blanchard thereupon commenced proceedings in the United States District Court for the Southern District of Iowa. That court, Stephenson, Chief Judge, granted his petition and ordered Iowa either to resentence him so that he could properly effect an appeal, or, alternatively, to release him. From this order Iowa appeals.

Iowa contends that the court erred by holding appellee was denied effective assistance of counsel because of counsel's failure to comply with the notice requirements of § 793.4 and that the State of Iowa in no way contributed to his denial of counsel. More specifically, Iowa maintains only gross misconduct on the part of retained counsel, such as a complete failure to commence an appeal, e.g., *Atilus v. United States*, 5 Cir., 1969, 406 F.2d 694, or affirmative coercion on the part of the state forcing a man to abandon his right of appeal, e.g., *Ford v. State*, Ia., 1965, 138 N.W.2d 116, constitute an effective denial of due process by requiring a criminal defendant to relinquish appellate review. It is argued that counsel's erroneous but good-faith attempted service and Iowa's mere acquiescence therein are not sufficient basis for violation of due process in this factual situation. We disagree.

Under certain circumstances failure to perfect an appeal is denial of effective counsel. *Leventhal v. Gavin*, 5 Cir., 1968, 396 F.2d 441. See, also, *Entzminger v. Iowa*, 1967, 386 U.S. 748. Indeed, failure by appointed or retained counsel to commence the simple steps for appeal is a blatant denial of due process. *Atilus v. United States*,

supra, 406 F.2d 694; *Williams* v. *United States*, 8 Cir., 1968, 402 F.2d 548; *Wainwright* v. *Simpson*, 5 Cir., 1966, 360 F.2d 307. Distinctions between gross or simple negligence on the part of counsel, or between retained or appointed counsel, or between active or passive negligence on the part of the state are immaterial. Whether counsel's conduct is classified as gross or excusable negligence or whether the state's activity is classified as passive or active is irrelevant, since in either case appellee has been denied effective and complete appellate review through no fault of his own. Compare, *Shipman* v. *Gladden*, Ore., 1969, 453 P.2d 921 (notice of appeal served on opposing counsel but not timely filed) with *Williams* v. *United States*, supra, 402 F.2d 548 (where counsel did not even commence appellate proceedings). In *Shipman*, the Supreme Court of Oregon stated at page 925 of 453 P.2d:

> "The failure to perform the simple procedure of timely filing a notice of appeal is not the 'effective' assistance of counsel required by *Powell* v. *Alabama*, nor the diligent advocacy required by *Anders* v. *California*. The failure of counsel to timely file a notice of appeal after he has been requested or agreed to do so is incompetence as a matter of law and a denial of due process. This is equally true whether the negligent counsel has been appointed or retained. The 'invidious discrimination' is not between the rich who can hire counsel and the poor for whom counsel must be appointed, but between those who are represented by competent counsel and those whose counsel prove to be grossly incompetent or culpably negligent."

In *Williams*, Chief Judge Van Oosterhout, speaking for this court, said, at page 552 of 402 F.2d:

> *"It is our view that Williams was abandoned by his court-appointed counsel during the period allowed him for taking an appeal. If it can be said that coun-*

sel was nominally acting for him, the result would be no different. It is undisputed that on the day after sentence Williams unequivocally advised his counsel of his desire to appeal and that he had consistently maintained such a position. The record clearly shows that Mr. Howard understood that Williams desired to appeal. (Emphasis supplied.)

"The failure of counsel to take the simple steps required to file a notice of appeal when instructed by his client to do so would, as stated by the District of Columbia Circuit in *Dillane* v. *United States*, 121 U.S.App.D.C. 354, 350 F.2d 732, constitutes 'such an extraordinary inattention to a client's interests as to amount to ineffective assistance of counsel cognizable under Section 2255.' See *Hines* v. *United States*, 237 A.2d 827, D.C.Ct.App.; *People* v. *Shockey*, 25 Ill.2d 528, 185 N.E.2d 893, 897 (dissenting opinion Justice Shaefer). The holding of the majority in the case last cited was reversed in *Shockey* v. *Illinois*, 375 U.S. 22, 84 S.Ct. 83, 11 L.Ed.2d 43.

"We hold Williams was deprived of his constitutional right to effective assistance of counsel at the critical time between sentence and the expiration of time to appeal and that he was thereby deprived of his constitutional right to appellate review of his conviction."

The real question, therefore, is whether the treatment afforded the accused by the state so invidiously classifies him as to shock the conscience and consequently to violate due process. See, *United States ex rel. Maselli* v. *Reincke*, 2 Cir., 1967, 383 F.2d 129; *Shipman* v. *Gladden*, supra, 453 P.2d 921. We hold the present case falls within that narrow area.

Examining the record as a whole, we note that: (1) Appellee desired to appeal and did all in his power as a layman to perfect his appeal; (2) appellee's attorney at-

tempted to appeal but failed to serve written notice thereof on the Assistant County Attorney, although he did verbally communicate the information as to the appeal to such official; (3) the Assistant County Attorney knew of the appeal and even saw the actual notice but did nothing; (4) the Attorney General of the State of Iowa received written notice of the appeal; (5) while Iowa engaged in no *affirmative* misconduct to deny appellee his appeal rights, it took prompt advantage of the appellee's attorney's minor procedural mistake by summarily dismissing the appeal, even though its representatives were well aware of the notice of appeal and it was in no way prejudiced, harmed or delayed by the omission to serve such notice.

In Chief Judge Stephenson's carefully considered opinion, he stated in conclusion:

> "It is the view of this Court that when all the circumstances presented by this case are considered as a whole, it must be concluded that the state has contributed to the loss of petitioner's appellate rights in violation of Section 1, Article XIV, Amendments to the Constitution of the United States of America. This is not to say there is any one act or omission on the part of the state or its officers here, in and of itself, sufficient to constitute such a violation. Nevertheless, the result is unjust. Petitioner should not be denied his right to appeal which was improperly perfected under the circumstances present here."

We agree with Judge Stephenson and find that in the exceptional circumstances present here, the appellee was denied due process and not afforded fair treatment by either his attorney or the State of Iowa.

The decision and order of the District Court are in all respects affirmed.

Bright, Circuit Judge, concurring.

I concur in the result. I believe the failure of defendant's counsel to perfect an appeal by following the simple procedures mandated by §793.4 of the Iowa Code, including service of the notice of appeal upon adverse counsel, deprived defendant of effective assistance of counsel within the rule of *Williams v. United States*, 402 F.2d 548, 552 (8th Cir. 1968), and I affirm solely on that ground. I am not, however, prepared to say in this case that the prosecutor's failure to guide or correct defense attorney's steps in taking an appeal contributed to an invasion of the defendant's constitutional rights. The duty to take and perfect an appeal on behalf of the client rested upon the defendant's counsel.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION**

LEON H. NEPPLE,
No. 30629

Petitioner,) Civil No. 3-894-D

v.)

LOU V. BREWER, Warden,) O R D E R

Respondent.)

This matter is before the Court on the petition for a writ of habeas corpus filed by Leon H. Nepple. Since it appears that petitioner herein has been denied effective and complete appellate review through no fault of his own and in view of *Blanchard v. Brewer*, ___ F.2d . . ; No. 20101, 8th Circuit, July 21, 1970, it is the view of this Court that petitioner should be granted an opportunity to seek a delayed appeal to the Iowa Supreme Court.

IT IS ORDERED that petitioner is granted 60 days in which to seek a delayed appeal to the Iowa Supreme Court. Jurisdiction is retained pending action by the Iowa Supreme Court.

Dated this 28th day of July, 1970.

/s/ Roy L. Stephenson
CHIEF JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WILLIAM T. RAWLS, JR.,	)	
Petitioner,	)	Civil No. 10-96-C-1
v.	)	
L. V. BREWER, Warden,		MEMORANDUM AND ORDER
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court upon a petition for a writ of habeas corpus filed September 1, 1970, by William T. Rawls, Jr.

Petitioner alleges three grounds for relief in this case. He says (1) that he was denied an appeal to the Iowa Supreme Court from his conviction of burglary with aggravation; (2) that he was denied effective assistance of counsel; and (3) that testimony was improperly admitted at his trial concerning property obtained by an illegal search. The facts giving rise to the first two issues in this compalint are set forth in the subsequent paragraphs of this memorandum and order. The third issue will not be reached by the Court at this time.

Petitioner, now incarcerated at the Iowa State Penitentiary at Fort Madison, Iowa, is serving a thirty-five year sentence imposed by the Mahaska County Iowa District Court after he was convicted by a jury of burglary with aggravation in violation of Iowa Code §§ 708.1 and 708.2 (1966).

After petitioner's conviction, his trial counsel filed notice of appeal. Subsequently, that notice was attacked by a

motion to dismiss on the grounds that it did not specify the judgment appealed from and was not directed to the State of Iowa or its attorney of record. Counsel for petitioner resisted the motion. Nevertheless, the appeal was dismissed without consideration of its merits by the Iowa Supreme Court.

Petitioner has made several and varied attempts to obtain appellate review in connection with his conviction. It appears that such review was denied in the first instance through no fault of petitioner and on rather technical grounds. There is no question here but that the notice of appeal in question was served on the proper party. Although it did not specify the judgment appealed from, it did carry the caption of the case. It is difficult to see how anyone other than petitioner has been prejudiced under the facts presented here. Petitioner is, of course, bound by the terms of a thirty-five year prison sentence.

The Court notes that petitioner has not taken appeals from adverse decisions in the Iowa State Courts in reference to his attempts to obtain some sort of relief in these premises. The Court, being ever mindful of the relationship between the State and Federal Courts and in view of *Blanchard v. Brewer*, No. 10101, 8th Cir., July 21, 1970, is of the view that petitioner should be granted an opportunity to seek a delayed appeal or other comparable remedy in the Iowa Supreme Court.[1]

IT IS ORDERED that petitioner be and is hereby granted 60 days in which to seek a delayed appeal or other comparable remedy in the Iowa Supreme Court. Jurisidction of this case is retained pending action by the Iowa Supreme Court.

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[1] *See Nepple v. Brewer*, No. 3-894-D, D.C.S.D. Iowa, July 28, 1970.

IT IS FURTHER ORDERED that unless petitioner notifies this Court that further action in this Court is necessary within 90 days of the date of this order, this case will stand dismissed.

Dated this 30th day of September, 1970.

/s/ Roy L. Stephenson
CHIEF JUDGE

APPENDIX F

Editorial in the Des Moines Tribune, on November 17, 1969.

FLIMSY TECHNICALITY DEFEATS AN APPEAL

The Iowa Supreme Court again has ruled that the client of the attorney who errs in filing appeal papers loses his right to appeal. The court took this same position in a decision last May. It declared last week that it sees no reason to alter its stand in light of a recent U.S. Supreme Court ruling.

The issue in the May ruling and in last week's case was an attorney's ignorance of the proper procedure for serving notice of appeal in criminal cases. The law specifies that notice of intention to appeal a criminal case to the Iowa Supreme Court must be served on the county attorney. The unfamiliarity of many attorneys with criminal practice frequently results in the notice being filed instead with the District Court clerk. This is the procedure specified by court rules for appealing civil cases.

Even though the court clerk invariably informs the county attorney that a criminal appeal has been filed, the Supreme Court takes the position that the county attorney has not been served notice and the court "is without jurisdiction" to hear the appeal.

In the year ending July 1, 1969, more than 60 criminal appeals were dismissed by the Iowa Supreme Court. Failure to follow the letter of the law on serving notice on the county attorney is the biggest single reason for loss of the right to appeal by dismissal.

Adhering to proper procedure is important, but so is the right to appeal. Forcing a prisoner to give up his right to appeal because his attorney sends the appeal notice to the wrong office will seem to most persons to reflect a picayunish concern for form over substance—especially when the county attorney actually can be shown to have been informed of the appeal.

One way to eliminate the confusion caused by having different appeal requirements for civil and criminal cases is to make them uniform. The Legislature could do this simply by providing that notice for criminal appeals be filed with the court clerk and then requiring the clerk to notify the county attorney. The Iowa Supreme Court's declaration that it will continue to block appeals on the notice-of-appeal technicality makes it essential for the Legislature to act to prevent future miscarriages of justice.

APPENDIX G

Editorial in the Des Moines Register on August 14, 1970:

SHODDY IOWA APPEAL PRACTICES

Federal courts in recent weeks have twice rebuked the Iowa Supreme Court for its method of disposing of criminal appeals. The courts in both cases ruled that the Iowa high court had improperly denied prisoners their chance for review of their convictions.

Herbert Blanchard was sentenced in 1968 to five years for criminal solicitation. He lost his chance for appeal of his conviction because his attorney inadvertently filed notice of the appeal with the clerk of court instead of with the county attorney. Civil cases are appealed by notifying the court clerk, but written notice in criminal appeals must be served on the prosecutor. Blanchard's attorney mistakenly followed the procedure for civil cases.

The attorney general's office then asked for dismissal of the appeal, and the Iowa Supreme Court granted the dismissal even though the county attorney had been given oral notice of the appeal and he was aware of the filing in the clerk's office. The Iowa high court subsequently denied a request for delayed appeal and rejected Blanchard's bid for appeal through habeas corpus.

Blanchard then went to federal court, where District Judge Roy Stephenson ruled last December that he "should not be denied his right to appeal . . . under the circumstances present here." The Stephenson ruling was appealed to the Eighth Circuit Court of Appeals, which on July 21 upheld the judge and declared, "(Blanchard) was denied his right to appeal and not afforded fair treatment by either his attorney or the State of Iowa."

Leon Nepple, sentenced to five years for larceny of domestic animals, similarly lost the chance for appeal through no fault of his own. His attorney failed to file with the

Iowa Supreme Court the abstract of the trial record and brief and argument. The Iowa Supreme Court granted the attorney general's request to dismiss the appeal and later denied Nepple's request for a delayed appeal.

Nepple took his case to Judge Stephenson, who on July 28 in effect said the Iowa Supreme Court should reverse itself and grant Nepple a delayed appeal since he "has been denied effective and complete appellate review through no fault of his own."

* * *

The Blanchard and Nepple rulings are but the latest signs of federal court dissatisfaction with the Iowa Supreme Court's criminal appeals procedure. The U.S. Supreme Court in 1967 ruled unconstitutional the Iowa practice of reviewing cases on the "clerk's transcript" a collection of miscellaneous papers having little to do with the appeal issues when attorneys failed to submit the abstract of record and briefs and arguments needed to perfect an appeal.

The procedure for dismissing appeals when these papers are not filed was adopted following the U.S. Supreme Court ruling. It is evident from the Nepple case that the changed procedure does not adequately protect the rights of defendants. Instead of getting an appeal on the clerk's transcript when an attorney fails to perfect an appeal, the client now simply has his case dismissed.

More than 60 Iowa criminal appeals are dismissed each year, most of them either because attorneys mistakenly filed the appeals with the court clerk as in the Blanchard case, or because of failure to submit the necessary appeal papers as in the Nepple case.

The Iowa Supreme Court's willingness to go along with such miscarriages of justice is inexcusable. We hope the recent federal court rulings will prompt a re-examination by the Iowa high court of its appeal rules and procedures. We repeat what we said in an editorial a year ago on the Nepple case:

"The requirement that appeals be perfected on time should be made binding on attorneys, and the client's right to appeal should be preserved in cases where attorneys breach their obligation to the client. The court itself should undertake close supervision of appeals to make certain that the right to appeal is fully honored in Iowa."